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No. 00-576 OCT 10 2000

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In The Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,
Petitioner,

v.

THEODORE FAULK, NEWPORT NEWS SHIPBUILDING AND DRY DOCK CO. and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER THE FOURTH CIRCUIT ERRED IN HOLDING THAT AN EMPLOYER MUST PRODUCE SUBSTANTIAL EVIDENCE THAT AN EXPOSURE TO A HAZARDOUS SUBSTANCE NOT ONLY DID NOT CAUSE, BUT COULD NOT HAVE CAUSED, INJURY IN ORDER TO REBUT THE SECTION 20(A) PRESUMPTION UNDER THE LONGSHORE HARBOR WORKERS' COMPENSATION ACT.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, decided July 11, 2000, is attached as Appendix 1. The Decision and Order of the Administrative Law Judge is attached as Appendix 2. The Decision of the Benefits Review Board is attached as Appendix 3.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit was issued on July 11, 2000. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

33 U.S.C. §920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - -

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employed.

(d) that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

STATEMENT OF THE CASE

Claimant was employed as a shipfitter by Newport News Shipbuilding and Drydock Co. between January, 1973 and November, 1978. During this time frame, he cut asbestos cloth without the use of a respirator and was otherwise exposed to asbestos dust.

Between 1978 and November, 1996, claimant was employed at Norshipco, where he is aware of only one exposure to asbestos - - an occasion in October or November, 1996 in which an asbestos pipe cover was ripped. Although plaintiff was not in the area when the rip occurred, he did enter the area later with a respirator.

On November 27, 1996, plaintiff was diagnosed with peritoneal mesothelioma, caused at least in part by airborne exposure to asbestos, and was permanently and totally disabled.

On January 21, 1997, plaintiff filed a claim under the Longshore Harbor Workers' Compensation Act for permanent total disability benefits because of "asbestos related lung disease" against both Norshipco and Newport News Shipbuilding and Drydock Co.

On October 1, 1997, an Administrative Law Judge, Daniel A. Sarno, conducted a hearing in this matter. By Decision and Order dated April 28, 1998, and filed with the Office of the District Director, Fifth Compensation District, on

May 1, 1998, Judge Sarno found that Norshipco was the responsible employer and that it was not entitled to benefits under Section 8(f) of the Act.

Norshipco, by counsel, timely filed the Petition for Review on May 12, 1998. In its May 17, 1999, Decision and Order, the Benefits Review Board affirmed the finding that Norshipco was the responsible employer and that it was not entitled to relief under Section 8(f) of the Act.

On June 3, 1999, Norshipco, by counsel, timely filed the Petition for Review with the United States Court of Appeals for the Fourth Circuit. On July 11, 2000, the United States Court of Appeals for the Fourth Circuit held that unresolved medical evidence that the only asbestos "exposure" during Petitioner's employment with Norshipco did not cause the disease was not sufficient to rebut the presumption that Norshipco was liable as the last responsible employer where Norshipco did not introduce evidence that the exposure could not have caused the disease.

REASON FOR GRANTING PETITION

The opinion of the Fourth Circuit Court of Appeals conflicts with the opinions of this Court and is inconsistent with the opinions of other United Stated Circuit Courts of Appeal.

Section 20(a) of the Longshore Harbor Workers' Compensation Act provides that when a claimant establishes that he has suffered harm and that working conditions existed which could have caused the harm, there arises a rebuttable presumption that the working conditions did, in fact, cause the harm. Lacey v. Four Corners Pipe Line, 17 B.R.B.S. 139 (1985);

Graham v. Newport News Shipbuilding and Dry Dock Co., 13 B.R.B.S. 336 (1981); Kelaita v. Triple A Machine Shop, 13 B.R.B.S. 326 (1981). To rebut this presumption, they employer must produce substantial evidence that the claim does not "arise out of and in the course of employment." 33 U.S.C. 902(2). Upon the introduction of such evidence, the presumption falls out of the case and the burden is on the claimant to produce evidence on the issue of causation. Delvechio v. Bowers, 296 U.S. 280, 186 (1935).

In the matter *sub judice*, Faulk was diagnosed on November 27, 1996 with peritoneal mesothelioma caused, at least in part, by exposure to airborne dust and fibers. He made a claim under the LHWCA Newport News Shipbuilding & Drydock Co., where he had been employed prior to 1978 cutting asbestos cloth and working others using asbestos materials. Faulk also made a claim against Norshipco where he had been an employee after 1978 but where he was only exposed to asbestos on one occasion in October or November, 1996, after he had begun experiencing symptoms of peritoneal mesothelioma but before being diagnosed. Norshipco offered medical testimony that this exposure did not cause the peritoneal mesothelioma.

In affirming the opinions of the Benefits Review Board, the Fourth Circuit Court of Appeals held that competent medical testimony that the exposure at Norshipco did not cause Faulk's disease was insufficient to rebut the §20(a) presumption where Norshipco offered no evidence that the exposure "did not have the potential to cause the disease or was in insufficient quantities to cause the [disease]." In so ruling, the Fourth Circuit confuses an element necessary for claimant to establish a prima facie case

(that the exposure had the potential to cause harm) with the presumption itself (that the exposure did not cause harm).

Once the claimant establishes that an exposure had the potential to cause harm, he receives the benefit of the §20(a) presumption that the exposure did, in fact, cause harm. It is this second fact - - that the exposure did cause harm - - which is a necessary element for the claimant to prevail under the LHWCA. U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP (Riley), 455 U.S. 608, 614 (1994). It follows, therefore, that the employer must offer substantial evidence to rebut this second fact - - that the exposure did cause harm. Norshipco did so.

Requiring Norshipco to offer evidence that the exposure did not have the potential to cause the injury, it appears to conflict with this Court's holding in U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP (Riley), 455 U.S. 608, (1982), (in order to be compensable, an injury must be caused by employment). Once Norshipco offered evidence severing the causal connection between Faulk's employment and the disease, the presumption under §20(a) that the injury was caused by the employment dropped from the case and the burden again rested with the plaintiff to come forth with some evidence that caused or contributed to cause the disease.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the Fourth Circuit Court of Appeals.

Respectfully submitted,
NORFOLK SHIPBUILDING & DRYDOCK CORP.

By _____
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NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION, Petitioner,

v

Theodore FAULK; Director, Office of Workers' Compensation Programs, United States Department of Labor; Newport News Shipbuilding and Dry Dock Company,

Respondents.

No. 99-1755.

Argued April 6, 2000.

Decided July 11, 2000.

On Petition for Review of an Order of the Benefits Review Board. (98-1128).

Gerard E.W. Voyer, Taylor & Walker, Norfolk, VA, for petitioner.

Benjamin McMullan Mason, Mason, Cowardin & Mason, Newport News, VA, for respondent Newport News Shipbuilding; Kristin Marie Dadey, Office of the Solicitor, United States Department of Labor, Washington, DC, for respondent Director; Gary Richard West, Patten, Wornom, Hatten & Diamonstein, L.C., Newport News, VA, for respondent Faulk.

ON BRIEF: Donna White Kearney, Taylor & Walker, Norfolk, VA, for petitioner.

Lexine D. Walker, Mason, Cowardin & Mason, Newport News, VA, for respondent

Newport News Shipbuilding. Henry L. Solano, Solicitor of Labor, Carol A. De Deo,

Associate Solicitor for Employee Benefits, Samuel J. Oshineky, for Longshore,

Office of the Solicitor, United States Department of Labor, Washington, DC, for respondent Director.

Before WILKINS and MICHAEL, Circuit Judges, and DUFFY, United States District

Judge for the District of South Carolina, Bitting by designation.

OPINION

PER CIJRIAM

**1 Norfolk Shipbuilding & Dry Dock Corporation ("Norshipco") petitions for review of the order of the Benefits Review Hoard of the Department of Labor ("Board") affirming the administrative law judge's ("AU") order finding

Norshipco the responsible employer and awarding permanent total disability benefits to Theodore R. Faulk for asbestos-related peritoneal mesothelioma under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C .A. §§ 901-950 (West 1986 & Supp.1999). We have jurisdiction under section 21(C) of the LHWCA to review final orders of the Board for injuries occurring in states within the circuit. 33 U.S.C. § 921(c).

I.

We review Board decisions for errors of law and for adherence to the statutory standard governing the ALJ's factual findings. See Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP (Harcum), 131 F.3d 1079, 1081 (4th Cir.1997); 33 U.S.C. § 921(b) (3). Section 21(b) (3) of the LHWCA directs that "[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b) (3). To determine whether the Board complied with the standard, the Court of Appeals conducts an independent review of the administrative record. Bumble Bee Seafoods v. Director, OWCP (Hanson), 629 F.2d 1327, 1329 (9th Cir.1980). Like the Board, the Court of Appeals will uphold the factual findings of the ALJ so long as they are supported by substantial evidence, and it will not disregard these findings merely "on the basis that other inferences might have been more reasonable." Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Carmines), 138

F.3d 134, 140 (4th Cir. 1998). Review of factual findings is limited, and "[d]eference must be given the fact-finder's inferences and credibility assessments." Id. (quoting Newport News Shipbuilding and Dry Dock Co. v. Tann, 841 F.2d 540 543 (4th Cir.1998)). Nevertheless, to be sufficient, the evidence must be "more than a scintilla but less than a preponderance," Elliott v. Administrator, Animal & Plant Health Inspection Serv., 990 F.2d 140, 144 (4th Cir. 1993), and "such relevant evidence as a reasonable mind might accept *as* adequate to support a conclusion." Carmines, 138 F.3d at 140 (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). The ALJ May not "merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." Carmines, 138 F.3d at 140.

II.

Theodore R. Faulk was employed by Norshipco as a shipfitter from November 29, 1978 until November 27, 1996. Prior to his employment at Norshipco, Faulk spent almost six years constructing and repairing ships at Newport News Shipbuilding and Dry Dock Company ("NNS"). On November 27, 1996, Faulk was diagnosed with peritoneal mesotheliorna, caused, at least in part, by his exposure to airborne asbestos dust; and fibers. Faulk has a permanent and total disability which is deemed to have begun on November 27, 1996 and is continuing as a result of the mesothelioma.

**2 Faulk testified that he was certain that he was exposed to asbestos while

employed at NNS as a shipfitter. He cut asbestos cloth and used it to cover himself and other surfaces as protection from welding tire. Cutting and moving the cloth created visible dust and particles. He also worked around insulators and welders who used asbestos materials. Faulk rarely wore a respirator while at NNS. NNS does not deny Faulk's exposure and did not present any contradictory evidence.

With respect to his employment at Norshipco. Faulk testified that he could not state with certainty that he was exposed to asbestos except for the time he worked aboard the U.S.S. Flint when Norshipco informed him of the presence of asbestos. The incident on the U.S.S. Flint occurred in October or November of 1996 when workers ruptured the insulation around a pipe covering when they hit it with the sharp edge of a bulkhead. Faulk had worked in and around the compartment for days, but was not present during the rupture. Regarding the incident, Faulk recalled, "I came in right after that had happened, and they told me what had happened, so I got my tools, and I got out of the room until they came in to test it to see what was wrong, see what kind of material it was." J.A. at 728. He estimated that it took him five minutes to pick up his tools. Later that day, Faulk returned to put his tools back in the compartment where he was storing them. After the rupture, Norshipco had someone come and test the material. The night crew fixed the torn area but did not remove all the asbestos from the pipe. Faulk described the

compartment after the rupture as follows: "It wasn't real dusty or nothing in there. It was just normal like it always been. You couldn't tell nothing had happened." J.A. at 720.

Faulk testified that he had used a respirator when he was in the compartment on the day of the rupture but that he had not "constantly" used a respirator while working aboard the ship. Although he was not in the compartment during the rupture, the record is unclear about where he was or how far away he was from the compartment, or if it was completely sealed at the time of the rupture. Faulk was not wearing a respirator when the pipe ruptured.

Faulk also stated that he was "sure" that he had been on many ships with asbestos at Norshipco. He was able to point specifically to the U.S.S. Briscoe, the U.S.S. Coronado, the U.S.S. Detroit, and the U.S.S. Josephus Daniels as ships he worked on while at Norshipco, although he claimed no actual knowledge of asbestos on those ships. His job as a shipfitter encompassed removing and replacing bent steel, removing and installing foundations, and removing flooring to reach the steel deck for renovation. Although he could not remember the specific jobs he performed or the length of time he spent on each ship he recalled working in the engine room of two ships which housed boilers generally insulated with asbestos materials. However, Faulk could not recall whether the insulation was being torn off while he was working on each respective ship.
**3 In addition to his work, Faulk was present in ship compartments when other tradesmen such as insulators, tore off old insulation before they covered pipes.

or put insulation on walls. He was frequently around insulators as they removed insulation on Navy ships to complete repair work. Faulk also removed tile flooring with a chipping hammer. This type of work generates a great deal of dust and trash as the concrete under the tile is chipped away. It was not until November of 1996 that Faulk became aware that some of the flooring material contained asbestos. Because repair work generates considerably more dust and smoke than new construction work, he wore a respirator during his employment at Norshipco as early as 1978. Faulk testified that he took it upon himself to wear a respirator because Norshipco "did not have a good ventilation system on these jobs ... they [were] very slack in ... ventilating the area, getting the smoke out." J.A. at 49. While he wore a respirator a majority of the time, he did not "walk around eight hours a day with a respirator on," JA. at 72. In his deposition, Faulk stated that he did not always wear a respirator when the tile floors were being torn up and the insulation was torn off. J.A. at 724. Faulk described the respirators as rubber with double filters on each side that fit over the nose and under the mouth. He would use it for a few days and then exchange it for a clean one. He sometimes also used paper-type disposable respirators depending on the type of work.

Faulk recalled times when Norshipco closed off an area to its employees while asbestos was being removed, but he was unsure

whether they took these measures all the time or when he first arrived in 1978. He could not state with a certainty that the dust from the Norshipco jobs contained asbestos, because he "didn't have anything tested." J.A. at 65.

NNS presented the testimony of Daniel Harrington, a certified industrial hygienist at NNS, for his conclusion that Faulk was exposed to asbestos on two naval ships at Norshipco. While Harrington was not directly responsible for NNS's asbestos program, he testified that he had "extensive experience" with asbestos. J. A. at 87. Harrington explained that asbestos was commonly used in thermal insulation systems, cloth, gaskets, floor tiles, underlayment, adhesive glue or cement, friction materials, and a variety of tapes. He testified that prior to 1971, Navy ships used asbestos "almost exclusively" on thermal insulation systems. J.A. 90, 100-01. While he had no access to specific ship specifications, he based this statement on the reference book The Naval Ships Technical Manual, a Department of Defense document. Harrington also relied upon Jayne's Fighting Ships to determine that two of the ships on which Faulk worked, the Josephus Daniels and the Coronado, had been built prior to 1971. From that, Harrington concluded that Faulk was exposed to asbestos at Norshipco. Harrington admitted that he did not research the ships' histories to learn of every overhaul or repair and conceded that it might be possible that the ships were repaired, removing the asbestos prior to their arrival at Norshipco. However, he did state that he had not seen any projects where NNS was asked to remove all the asbestos from a ship; instead, the Navy's standard procedure was to

remove all the asbestos from a ship; instead, the Navy's standard procedure was to remove

what was necessary to complete a job without disturbing the rest. **4 Harrington also acknowledged that NNS used asbestos extensively prior to his arrival in 1979 and that it was possible Faulk was exposed to asbestos at NNS. Since Harrington's employment, the bulk of NNS's asbestos work has involved removal and replacement with non-asbestos materials. NNS has used asbestos-free material in new construction and repair at least since 1979. The Naval Ships Technical Manual also noted that since 1974 most thermal insulation had been repaired with asbestos-free materials. Harrington further testified that there is no risk of exposure if the asbestos-containing materials are not disturbed and are in a well-maintained condition.

Norshipco presented the medical expert testimony of Dr. Paul Fairman, a pulmonary disease specialist at the Medical College of Virginia. He explained that peritoneal mesothelioma generally develops 35-40 years after the initial exposure and that it is extremely rare for it to develop in less than 20 years. Dr. Fairman reviewed Faulk's medical records, deposition testimony, and interrogatory answers, and opined that any exposure to asbestos aboard the U.S.S. Flint did not cause Faulk's mesothelioma, but

that it was caused by the inhalation of asbestos at NNS.

After the hearing, the ALJ made extensive findings of fact. In his decision, the ALJ found "that the weight of the credible evidence establishes that Claimant was exposed to asbestos while working at Norshipco." J.A. at 764. In reaching his decision, he found Faulk to be "a very credible witness" and detailed the facts supporting exposure. Id. For instance, the ALJ noted that Faulk stored his tools in the U.S.S. Flint compartment where the insulation rupture occurred; that he worked in and around the compartment for days; that he entered the compartment twice after the rupture; that there was no evidence that the compartment was sealed off before or after the rupture; that he wore a respirator while in the compartment but had not continuously worn one while working around the compartment before, during, and after the rupture; that Faulk did not wear his respirator for the entire eight hour shift; that Dr. Steinberg noted that asbestos exposure can occur when protective clothing is not worn; and that Faulk did not wear protective clothing during his years of employment. Moreover, he found that Norshipco offered no evidence to contradict Faulk's assertions that he was exposed to asbestos while aboard the U.S.S. Flint. He also noted that Harrington's credible testimony helped "to generally buttress Claimant's testimony that he may well have been exposed to asbestos at other times while performing repair work at Norshipco on various Navy ships from 1978-1996. " J.A. at 764. Nonetheless, the ALJ limited his finding to exposure on the U.S.S. Flint.

On appeal, the Board emphasized the ALJ's determination that Faulk was a very credible witness. In determining that credible evidence supported the Ms's decision, the Board noted that,

217 F.3d 840 (Table)
(Cite as: 217 F.3d 840, 2000 WL 950382, **5 (4th Cir. (S.C.)))

**5 Claimant testified that, while he believed he may have worked on many ships exposing him to asbestos at Norfolk, he could recall only one incident of confirmed exposure to asbestos, which occurred aboard the U.S.S. FLINT, when pipe insulation ruptured in a particular compartment where he worked; claimant testified he entered this area twice following the rupture to pick up and return tools. Claimant stated that he wore a respirator on the day he learned of the presence of asbestos, but had not been wearing a respirator at the time the rupture occurred. The [ALJ] further reasoned that the credible testimony of Mr. Harrington, an industrial hygienist at Newport News, generally buttresses claimant's testimony that he may have been exposed to asbestos at other times while performing repair work at Norfolk on various Navy ships. According to Mr. Harrington, based on the Naval Ship's Technical Manual, § 635-10.8 (1st rev. May 15, 1986), ships built prior to 1971 used asbestos for thermal insulation. Mr. Harrington confirmed that two of the ships on which claimant worked at Norfolk were built before 1971.

J.A. at 774-75 (citations and footnotes omitted). As a result, the

Board affirmed.

III.

It is undisputed that asbestos exposure caused Faulk's peritoneal mesothelioma. The sole issue is the identity of the employer responsible for the exposure under the LHWCA. The last employer rule, which controls the allocation of liability among multiple employers or carriers in occupational disease cases, was set forth in Traveler's Ins. Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.1955), and has been followed by many circuits. See e.g., Liberty Mutual Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750, 752 (1st Cir.1992); Avondale Indus., Inc. v. Director, OWCP (Cuevas), 977 F.2d 186, 190 (5th Cir.1992); Port of Portland v. Director, OWCP, 932 F.2d 836, 840 (9th Cir.1991); see also Newport News Shipbuilding and Dry Dock v. Fishel, 694 F.2d 327, 329 n. 2 (4th Cir.1982} (explaining the last employer rule but finding instead that the aggravation rule was applicable to the given facts). In Cardillo, the Second Circuit held that; the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable [or the full amount of the award. Cardillo, 225 F.2d at 145.

In adopting the rule, the Second Circuit noted that it was meant to avoid the difficulties and delays in administration of the Act that would result if courts attempted to apportion liability,

Cardillo, 225 F.2d at 145. The court recognized the practical difficulties of apportionment stating,

The nature of occupational diseases and the dearth of medical certainty with respect to the time that is required for them to develop and the permanence

and extent of the resultant injurious effects at different stages of the diseases' evolution, make it exceedingly difficult, if not practically impossible, to correlate the progression of the disease with specific points in time or specific industrial experiences.

**6 Id. at 144. While Norshipco "accepts the validity" of the Cardillo holding, it argues that NNS was the last employer to expose Faulk to injurious stimuli, and is therefore liable for benefits under the LHWCA. Norshipco challenges the ALJ's findings and conclusions by suggesting that NNS had the burden of proof and did not meet it; that the ALJ's findings were not based on substantial evidence; and that even if Faulk were considered exposed at Norshipco, Norshipco rebutted the presumption of liability.

Under the LHWCA, an employee is benefitted by a statutory

presumption of compensability. Section 20(a) provides that "in any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial. evidence to the contrary, that the claim comes within the provisions of this chapter." 33 U.S.C. § 920(a). "The presumption is a broad one, and advances the facility with which claims are to be treated to further the Act's purpose of compensating injured workers regardless of fault." Universal Maritime Corp. v. Moore, 126 F .36 256, 262 (4th Cir.l997).

The application of this presumption has resulted in a burden shifting scheme of proof for liability determinations. "An employee seeking to have the benefit of the statutory presumption must first allege (1) an injury or death (2) that arose out of and in the course of (3) his maritime employment," Id. [FNl] Once the employee makes this showing, the burden shifts to the employer, who must rebut the presumption with substantial evidence. See id. In order to rebut this presumption, the employer must prove that the exposure was not injurious or that the employee was exposed to injurious stimuli while performing work covered by the LHWCA for a subsequent employer. See Avondale Indus. (Cuevas), 977 F.3d at 190. An injurious exposure is one which had the potential to cause the disease or harm at issue. See id.; see also Todd Pacific Shipyards Corp. v. Director, OWCP (Picinich), 914 F.2d 1317, 1320 (9th Cir.1990) (requiring proof that exposure has the potential to cause the harm).

FN1. The Director questions the showing required for a claimant to establish his initial entitlement to the section 20(a) presumption of compensability. We, however, decline to address this issue because regardless of whether a claimant need only file a sufficient claim or make some evidentiary showing, Faulk did both.

This presumption and resulting burden shifting apply two-fold in this case. First, it applies to NNS as Faulk's former employer. In that case, once Faulk established entitlement to the presumption, the burden shifts to NNS to rebut

that presumption by showing either that the exposure did not have the potential to cause the harm or that Faulk was exposed to injurious stimuli with such potential while working for a subsequent employer.

While the ultimate conclusion, that Norshipco was the last responsible employer, is supported by substantial evidence, the ALJ's conclusion that NNS rebutted the presumption against it by establishing that Faulk was exposed subsequently at Norshipco was in error. In order for NNS to relieve itself of liability and foist liability on Norshipco, NNS must have proved that the U.S.S. Flint exposure had the potential to cause Faulk's disease, This, NNS tailed to do. Evidence that the exposure simply occurred is not enough.

**7 The alternative application of the presumption would apply directly to Norshipco. In that case, once Faulk established that he was entitled to the presumption in regard to his employment at Norshipco, the burden shifted to Norshipco to establish that such exposure did not have the potential to cause the disease or that Faulk was exposed to stimuli which had the potential to cause the disease while performing work for a subsequent employer.

As Faulk had no employer subsequent to Norshipco, the only way in which Norshipco could have rebutted the presumption of compensability would have been to establish that Faulk's exposure, while working for Norshipco, did not have the potential to cause the harm. Recognizing the suitability of this analysis to Faulk's claim, the Board affirmed the ALJ's ultimate decision on the reasoning that Norshipco had failed to meet this burden. [FN2]

> FN2. Norshipco argues that the presumption's applicability to it, as opposed to NNS, is not preserved for appeal because the issue was not raised below. However, Faulk filed his claim for benefits against each employer. And, as noted, infra, the Board based its decision affirming the award on the presumption's applicability to Norshipco. Accordingly, we have the authority to review the Board's legal reasoning.

This court reviews the Board for errors in law and to assure that the Board adhered to the substantial evidence standard when it reviewed the decision of the ALJ. See Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP (Harcum), 131 F.3d 1079, 1081. (4th Cir. 1997). The LHWCA mandates that an ALJ's findings be conclusive if they are supported by substantial evidence on the record as a whole. 33 U.S.C. § 921(b)(3). Rejecting the ALJ's conclusion that Faulk was sufficiently

exposed aboard the U.S.S. Flint, Norshipco asserts that it did not expose Faulk to injurious stimuli at all. It argues that because Fault was not present when the pipe ruptured, he entered the compartment for only five minutes and was wearing a respirator, the space was not dusty, and the rupture was repaired that night, ergo he was not exposed. As a result, Norshipco concludes that "the record is devoid of any evidence of exposure to airborne

particles." Appellant's Br. at 24.

The Board affirmed the ALJ noting his authority to evaluate the evidence and assess witness credibility. Granted, the Board could have shown more care in selecting the facts for its opinion. For example, it mentions that Faulk was not wearing a respirator during the rupture but fails to include that he was not present. However, this omission does not indicate that the Board failed to adhere to the standard. Norshipco also takes issue with the Board's reference to Harrington's testimony about Faulk's career exposure, implying that the Board improperly disregarded the ALJ's decision to limit exposure to only the U.S.S. Flint. This reference is nothing more than an indication that the Board reviewed the ALJ's decision on the record as a whole.

Like the Board, we must affirm if the findings are supported by substantial evidence. In its appeal, Norshipco focuses on Faulk's time in the compartment, emphasizing its brevity and his use of a respirator. The ALJ acknowledged these points but noted that Faulk had worked in and around the compartment for days. In particular, the ALJ found that there was no evidence that the compartment was closed off before or after the rupture. He also found that Faulk had not worn a respirator constantly while working around the area on the day of the accident. Moreover, Faulk was twice permitted to enter the area after the rupture to pick up and return his tools. In making these findings, the ALJ weighed and commented on the credibility of the various witnesses. The facts he relied upon are supported by the record, and his inferences tare reasonable. This court must defer to the fact-finder's credibility assessments and inferences. Carmines, 138 F.3d at140. A review of the record indicates that the ALJ appropriately examined the logic of the parties' conclusions and evaluated the evidence. Id. He asked relevant questions of the witnesses and did not find exposure in every instance presented by Faulk.

**8 Despite this deference, the evidence must still be sufficient - more than a scintilla but less than a preponderance. Elliott, 990 F.2d at 144. Norshipco relies upon the absence of visible dust after the rupture and Harrington's testimony that undisturbed asbestos is not a threat. These two facts, however, fail to mandate the inference that there was no injurious exposure aboard the

U.S.S. Flint, Furthermore, witnesses described repair work and the Norshipco environment as very dusty, even though Fault testified that after the rupture "it wasn't real dusty, or nothing in there. It was just normal like it always been. You couldn't tell nothing had happened." J.A. at 720. The record and the witness testimony appear to be of the kind that a reasonable mind could accept to support an adequate conclusion. Basically, Norshipco asks this court to draw different inferences from the facts. The case law is clear that this court cannot disregard an ALJ's findings "on the basis that other inferences might have been more reasonable." Carmines, 138 F.3d at 140.

Norshipco argues alternatively that even if Fault were exposed, the ALJ erred

by not finding that Norshipco rebutted the presumption of compensability given the latency of the disease and the brevity of the exposure, With regard to latency, Norshipco points to evidence that Faulk began experiencing abdominal pain prior to the U.S.S. Flint incident, Because Faulk experienced abdominal pain prior to the Flint incident and the latency period for the

disease is so long, Norshipco argues that it is factually impossible for employment at Norshipco to have contributed to Fault's mesothelioma. We disagree.

The Ninth Circuit rejected just this type of latency argument by an insurance carrier in Lustig v. U.S. Dep't of Labor, 881 F.2d 593, 596 (9th Cir.1989). In Lustig, the claimant worked for Todd Pacific Shipyards where he was exposed to asbestos during his employment as a pipefitter for approximately twenty-two years. Travelers Insurance provided LHWCA coverage to Todd for the first fifteen years of the claimant's employment, and Aetna did so for the remaining time. According to the Ninth Circuit, Aetna's contention, that a ten-year latency period for asbestos-related cancer meant that any exposure after that time period would not have affected the claimant's disability, "suggest [ed] an unwarranted change of the 'last employer rule' set forth in [Cardillo]." Id. Here, notwithstanding a prolonged latency period, Norshipco employed Faulk during the last eighteen years of his employment. During this period, Faulk was exposed to asbestos; and, Norshipco has failed to establish that such exposure could not have caused his mesothelioma. As the last employer, Norshipco is liable for the full amount of the claim.

Norshipco's reliance on Port of Portland v. Director, OWCP (Ronne), 932 F.2d 836, 840 (9th Cir.1991), is misplaced. There the court held that it was factually impossible for the claimant's employment with the employer to have contributed in any way

to his hearing loss where the claimant began his employment four days after the administration of the audiogram indicating his hearing loss. While the court recognized "a demonstrated medical causal relationship between the claimant's exposure and his occupational disease" was not required, it insisted on a "rational connection." Id. The evidence in this case fails to support the inference that due to the prolonged latency period of mesothelioma it was factually impossible for Faulk to have sustained injury by his exposure at Norshipco. Furthermore, Faulk was not diagnosed with the disease until after the U.S.S. Flint incident.

**9 Norshipco also suggests that it does not qualify as the responsible employer because Faulk's exposure was too brief or too minimal to have caused the disease. However, even assuming the applicability of a de minimus requirement, Norshipco has presented no evidence to establish that Faulk's exposure aboard the U.S.S. Flint was, in fact, de minimus. It presented no evidence of the asbestos level on the U.S.S. Flint the day of the incident, nor did it present evidence of the level of exposure it would take to cause the disease. Dr. Fairman merely opined that the U.S.S. Flint exposure did not cause

Faulk's mesothelioma. He did not state that such exposure did not have the potential to cause the disease or was in insufficient quantities to cause it. Furthermore, this court has never required proof of a certain level of exposure to injurious stimuli in order to warrant the attachment of liability under the LHWCA. The reason for this stems directly from the humanitarian nature of the LHWCA. See Newport News Shipbuilding and Dry Dock Co. v. Fishel, 694 F.2d 327, 330 (4th Cir. 1982) (accepting the aggravation rule for compensability under the LHWCA, in part, based upon the humanitarian nature of the Act). "The purpose of the Act is to help longshoremen." Id. (citing Reed v. Steamship Yaka, 373 U.S. 410, 415 (1963)) . It is from this purpose that the last employer rule originates, as well as a concern for administrative ease of claims handling and an elimination of the inherent difficulty in attempting to apportion liability among employers. See Cardillo, 225 P.2d at 145. Requiring the employee to prove sufficient levels of exposure to cause the disease puts obstacles before the employee. Whereas, the last employer rule works on the premise that all employers will be the last employer an equal amount of the time. See Todd Shipyards Corp. v. Black, 717 F.2d 1280, 1285 (9th Cir.1993), In our view, Norshipco's proposed rule would simply not promote the purposes of the LHWCA. We further note that the Fifth Circuit has also refused to set de minimus standards for exposure. Citing Cardillo, it rejected an employer's claim that exposure to sandblasting on two occasions was insufficient to impose liability. See Pulks v, Avondale Shipyards, Inc., 637 F.2d

1008, 1011-12 (5th Cir.1981); see also Cuevas, 977 F.2d at 190 ("regardless of the brevity of the exposure, if it has the potential to cause disease, it is considered injurious").

Norshipco maintains that we should adopt the rule applied by the Ninth Circuit in Todd Pacific Shipyards Corp. v. Director, OWCP (Picinich), 914 F.2d 1317 (9th Cir.1990), In that case the court held that the claimant must be exposed "to injurious stimuli in sufficient quantities to cause the disease." Id. at 1319, Norshipco interprets this holding as establishing a requirement that the exposure to injurious stimuli be more than de minimus. However, we decline to adopt such a rule. In Picinich, the ALJ determined that the claimant's exposure was "non-injurious" when the ship on which the claimant worked had undergone a complete asbestos removal procedure prior to his tenure, and testing of the area showed asbestos levels 250 times below the limit allowed by government regulations. Id. at 1320-22. This is clearly distinguishable from the case at bar.

IV.

**10 Upon application of the presumption to both NNS and Norshipco, we find that neither employer rebutted the presumption of compensability raised against each of them. Consequently, we find Norshipco liable as the last employer. As the responsible employer in this matter pursuant to the provisions of the LHWCA. Norshipco is entitled to credit for the net amount of all settlement

proceeds received by and/or on behalf of the Faulk from the Manville Settlement Trust in the amount of $20,000.00, and from the Center for Claims Resolution for $20,000.00, and from all settlements obtained to date.

Accordingly, the decision of the Benefits Review Board, affirming the ALJ's order for full compensation is AFFIRMED.

U.S. Department of Labor
Office of Administrative Law Judges
603 Pilot House Drive, Suite 300
Newport News, Virginia 23606-1904
(757) 873-3099
(757) 873-3634

Date: April 28, 1998

In the matter of:

THEODORE FAULK,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Employer

and

NORFOLK SHIPBUILDING
AND DRYDOCK CORPORATION,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-interest.

Gary R. West, Esq.
for Claimant

Benjamin M. Mason, Esq.
for Newport News Shipbuilding
and Dry Dock Company

Gerard F. Voyer, Esq.
for Norfolk Shipbuilding
and Drydock Corporation

LuAnn Kressley, Esq.
for Director, Office of Workers'
Compensation Programs

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises fr0om a claim under the Longshore and Harbor Workers' Compensation Act ("the Act")

33 U.S.C. 901 et seq. A formal hearing was held in this case on October 1,1997 in Newport News, Virginia Claimant offered exhibits CX-I through CX-5.[1] Newport News Shipbuilding and Dry Dock Company (NNS) offered exhibits NNS- 1 through NNS-5. Norfolk Shipbuilding and Drydock Corporation (Norshipco) offered exhibits NOR-I through NOR-22).[2] All were admitted into evidence All parties filed post-hearing briefs The findings and conclusions which follow are based on a complete review of' the entire record in light of the arguments of' the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

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[1] The following abbreviations will be used as citations to the record.

CX - Claimant's Exhibits

NNS - Newport News Shipbuilding and Dry Dock Company's Exhibits

NOR - Norfolk Shipbuilding and Drydock Corporation's Exhibits

DX - Director, Office of Worker's Compensation Programs' Exhibits

TR - Transcript.

[2] Post-hearing, Norshipco submitted portions of Chapter 635 of the Naval Ships' Technical Manual (NSTM). No objection was made to the receipt of the document. It is admitted into evidence as NOR 23.

Claimant, NNS and Norshipco stipulated to and I find the following facts.

1. Claimant was employed by NNS from January 29, 1973 until November 30, 1 978.

2. Claimant employed by Norshipco as a shipfitter from November 29, 1978 until November 27, 1996.

3. Throughout his at NNS, Claimant performed work related to ship construction and repair aboard ships of the navigable waters of the James River and/or piers and dry docks adjacent thereto.

4. Throughout his employment at Norshipco, Claimant performed work related to ship repair aboard ships on the navigable waters of the Elizabeth River and/or piers and dry docks adjacent thereto.

5. NNS is in the business of constructing and repairing oceangoing vessels.

6. Norshipco is in the business of repairing oceangoing vessels.

7. On November 27, 1996, Claimant was diagnosed with peritoneal mesothelioma by Dr. Kevin Wilson. This

mesothelioma was caused, at least in part, by his exposure to airborne asbestos dust and fibers.

8. Claimant is permanently and totally disabled from November 27, 1996 to Pie present and continuing as a result of mesothelioma.

9. Norshipco has paid no disability compensation to Claimant and no medical expenses to Claimant pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act").

10. If Norshipco is determined to be the Employer responsible for payment of benefits in this matter pursuant to the provisions of the LHWCA, it is entitled to credit for the net amount of all settlement proceeds received by and/or on behalf of' Claimant for the Manville Settlement Trust in the amount of $20,000.00 and for the Center for Claims resolution for $20,000.00 and for all settlements obtained to date.

11. The average weekly wage applicable to this matter is $640.08, yielding a total disability compensation rate of $426.72.

(TRI-2- 14)

ISSUES

1. Did Claimant sustain his last injurious exposure at NNS or Norshipco?

2. Is the responsible Employer entitled to relief under Section 8(f) of the Act?

FINDINGS OF FACT

1. Claimant worked at NNS as a shipfitter from January 1973 to November 1978. Eighty percent of Claimant's work at NNS was new construction of U. S. Navy ships. While working at NNS, Claimant was exposed to asbestos when using asbestos cloth and when working around other shipyard trades which generated asbestos dust while performing their duties.[3] Claimant did not often wear a respirator at NNS (TR 35-37,47-48,51). According to Claimant, new construction work did not generate nearly the amount of dirt and dust generated in ship repair work, the type of work he later did at Norshipco (TR44; EX-1, pp.8-9).

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[3] Claimant made clear from the beginning that he had no specific expertise in recognizing asbestos or asbestos products. I find his testimony very credible. His testimony concerning the presence of asbestos while working for both employers was based upon instances when he was specifically told that asbestos was present. NNS did not dispute that Claimant was exposed to asbestos while working there.

2. Claimant began working at Norshipco as a shipfitter in November 1978 and continued working there until November 1996 His work consisted primarily of repair work both on U.S. Navy and commercial vessels As before, Claimant could specifically state from his own expertise that he worked with asbestos or around others who worked with asbestos; however, his general belief was that during his years with Norshipco, many of the ships he worked On contained asbestos (TR 39-40). He noted that it was the practice of Norshipco to close off areas of ships where asbestos removal was taking place. Claimant did specifically recall one occasion in 1996. while working on the USS Flint, that an asbestos-insulated pipe covering was ruptured in a compartment undergoing extensive repair work in the vicinity of where he was working. Claimant had been working in and around that compartment for a number of days. After the rupture., Claimant was actually permitted to enter that compartment twice that day to pick up and drop off his tools. There is no evidence in the record that any steps were taken to in any way close off the compartment immediately after the rupture. Only after Claimant's shift ended did testing by Norshipco reveal that the ruptured pipe covering contained asbestos (TR 63-67; EX-l, p. 35), Because of the generally dusty conditions inherent in ship repair work, Claimant usually wore a respirator while working at Norshipco. However, he conceded that he would not wear a respirator constantly during any given eight hour shift. He did not necessarily wear a respirator when dusty work was being performed or when other trades were working with insulation

(TR67). Specifically referring to the incident aboard the USS Flint, Claimant stated, "if you're asking me did I have a respirator on at the time the pipe was ruptured, no, 1 didn't have a respirator on" (TR68).[4] However, Claimant did recall wearing a respirator when he actually entered the compartment to pick up and return his tools (NNS -1, pp. 37-38).

3. Claimant specifically recalled working on the following U.S. Navy ships at Norshipco: the USS Briscoe, the USS Coronado, the USS Detroit and the USS Josephus Daniels (TR 52, 54-55; NNS -3a,b,d). Claimant believed that he might have been exposed to asbestos on these ships also (TR 50). On such ships, Claimant was involved with such work as chipping and ripping out the flooring. This was very dusty work. Claimant later learned that such floor tiles could have contained asbestos. He also worked around others who were tearing out and replacing insulation. This work was also dusty. He also later learned that such insulation aboard U S Navy ships could have contained asbestos (TR58-63).

4. Daniel F. Harrington, a senior industrial hygienist at NNS. is responsible for program development and regulatory

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[4] Norshipco offered no evidence to contradict Claimant's testimony regarding either Norshipco's positive testing for asbestos or Claimant's version of the incident in 1996 aboard the USS Flint.

oversight.[5] His duties include regulatory oversight in the area of asbestos at NNS (TRB2-85). Mr. Harrington stated that asbestos was widely used in the shipbuilding industry, especially in older ships built prior to 197 l (TR86). Asbestos was used widely in various shipboard materials including gaskets, thermal insulation cloth, floor tiles, underlayerment (leveling compounds used under floor tiles), floor tile cement, friction materials (anchor windlass break shoes), various bulkhead tapes and pipe hanger wrap (TR89-91) Mr. Harrington relied upon Section 635-10.8 (Background) of the Naval Ship's Technical Manual (May 15,1986), which states:[6]

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[5] Program development consists of developing procedures, modifying procedures and making sure that the procedures that are in effect are maintained up to date with current law and science. Regulatory oversight consists of ensuring that NNS stays cognizant of the current laws and regulations (TR 82).

[6] Norshipco submitted an April 1994 change to that manual which purports to delete and replace major portions of that manual including Section 635.10.8 (NOR 23)> Norshipco did not submit what the changes were. Norshipco implies that the above background factual history is no longer valid because various changes were made to Section 10 which is titled Safety and Health Requirements, Removal Procedures, Control Measures, Environmental Monitoring, Medical Surveillance and Training. I will draw no such inference. Rather, I will draw the inference that whatever changes were made applied to changes in requirements procedures, measures, surveillance and training.

> Before 1971, nearly all thermal insulation used on Navy ships was asbestos, From 1971 to 1973, low asbestos materials (about 20 percent asbestos by weight) were specified to reduce the asbestos exposure hazard. Beginning in 1974, asbestos-free thermal insulation materials were specified for all services except pipe hanger liners. Many new construction, ships under construction in 1974 and later years, were already insulated with asbestos thermal insulation products and could not be reinsulated without enormous cost, ship delay, and asbestos exposure to insulation workers. As a result, most new ships commissioned through 1976 are equipped with some asbestos thermal insulation. Since 1974, most thermal insulation has been repaired with asbestos-free materials.
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> (EX-4)

5. Mr. Harrington confirmed that the USS Josephus Daniels and the USS Coronado were constructed before 1971

History cannot be deleted with a stroke of a pen. Mr. Harrington was a credible witness; consequently, I will rely upon his testimony as supported by Section 635.10.8 as written prior to the 1994 changes.

when asbestos was generally used aboard Navy ships.[7] Mr. Harrington found it unlikely that all asbestos had been removed from these ships prior to Claimant working aboard them. He explained that he has never known the Navy to engage in the mass removal of asbestos from its ships. Rather, the Navy tries to limit asbestos removal as much as possible, It tries to remove only what needs to be removed to complete a specific job. (TR124). Mr. Harrington stated that in the mid-I 970's, the shipbuilding industry became aware that asbestos was harmful. There was a concerted effort made in the shipbuilding industry to start eliminating the use of asbestos. Although asbestos still has limited applications, such as with gaskets and valve packets, there is no large exposure to asbestos when using those materials, Large exposure to asbestos would primarily be associated with removal of asbestos containing thermal insulation materials today (TR 106). Employer offered no contrary evidence to refute Mr. Harrington's testimony.

6. In November, 1996, Claimant learned from his treating physician, Dr. Wilson, that he had an asbestos related problem. Claimant has not worked since then. (NNS-1, pp.40-

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[7] Mr. Harrington referred to Jayne's Fighting Ships and determined that two of the ships listed by Claimant were built before 1971. The USS Josephus Daniels was built by Bath Iron Works of Bath Maine and launched in December 1963. The USS Coronado was built by Lockheed Shipbuilding Construction Corporation and launched in July 1966 (TR 91-93).

41). On November 25, 1996, based upon pathological review, Claimant was diagnosed with well- differentiated papillary mesothelioma (CX-5a; DX-l 13) This diagnosis was confirmed by Dr. Steinberg following an examination on December 2, 1996 (NOR-20). Dr. Steinberg found no pleural mesothelioma. Nor did Dr. Steinberg find any significant prior medical condition. On February, 19, 1997, Dr. Wilson found Claimant totally and permanently disabled from malignant mesothelioma of the abdominal peritoneum (CX-4). The mesothelioma was caused at least in part by asbestos exposure (CX-3A; NOR-21,22).[8] Dr. Steinberg noted that Claimant's asbestos exposure occurred from working around asbestos for many years without wearing protective clothing (NOR-20). Dr. Fairman reviewed the medical records and acknowledged that Claimant had been exposed to asbestos at both NNS and Norshipco, however, Dr. Fairman opined that Claimant's exposure at Norshipco was very limited and the majority of Claimant's exposure was at NNS.[9] He

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[8] Dr. Fairman is a Board Certified Internist with a sub-specialty in Pulmonary Medicine (CX-3B). Dr. Steinberg is a hematology-oncology specialist (NOR-20). Dr. Seal is a Board Certified pathologist (NOR-21). Dr. Kloss is a pathologist (NOR-22).

[9] Dr. Fairman appears to base this solely upon Claimant's deposition testimony and answers to interrogatories which equivocated about asbestos exposure at Norshipco due to Claimant's inability to identify asbestos.

further stated that peritoneal mesothelioma generally develops 35-40 years after initial exposure to asbestos; however he conceded that it could develop in some cases less than twenty after initial exposure. Dr. Fairman did not believe that Claimant's disease was caused by his asbestos exposure on the USS Flint. He opined that Claimant's exposure many years prior at NNS caused Claimant's disease (CX-3A).

7. Dr. Schwartz, a Board Certified Internist with a sub-specialty in Pulmonary Medicine,[10] reviewed the medical records and opined on July 21, 1997:

> I am in receipt of your July 10,1997 letter asking for my opinion regarding the medical records on the above individual. Given the medical records, it does not appear that Mr. Faulk had any pre-existing conditions that would contribute to his current bleak prognosis or level of impairment. There is no evidence that he had or has asbestos-induced Jung disease other than his mesothelioma. In fact, the CT scan of the thorax obtained by Dr. Steinberg on Dec. 5, 1996 indicates that he has bilateral basilar atelectasis. This is clearly distinguishable from asbestos-induced pulmonary fibrosis and also asbestos-

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[10] DX2-14.

> induced pleural fibrosis. The absence of radiographic features of asbestos-induced lung disease and his young age suggest that his impairment is primarily due to expansion of his abdominal contents which prevent him from taking a full inspiratory breath. In fact, it is common for individuals with ascites to have basilar ateleclasis because of the inability to inhale fully. Thus, I believe that Mr. Faulk has a mesothelioma but does not have evidence of any other form of asbestos-induced lung disease that predated or antedated the diagnosis of his mesothelioma.
> (DX-1)

8. Dr. Carr, a radiologist, read a September 30, 1996 chest x-ray. He observed "some linear atelectasis or scarring is noted in the vicinity of the left costophrenic angle." (DX-19, 23, 37; NNS-2e). Dr. Carr characterized the x-ray as showing "no acute cardiopulmonary abnormality. Dr. Reid, a NNS clinic physician, reviewed Dr. Carr's x-ray report and concluded that linear atalectasis or scarring causes permanent lung impairment and that "a cautious employer would not hire a worker for heavy and at times dusty manual labor, such as that at the Shipyard, if

he had a diagnosis of lung scarring."(NNS -2c-d, DX-2 1-22).[11] He further opined that "Mr. Faulk's lung impairment, AMA rating and disability are materially and substantially contributed to, materially and substantially hastened by, and materially and substantially caused by his pre-existing lung scarring disease. If Mr. Faulk merely had mesothelioma, his AMA rating would be at least 5% less." (N7NS -2c-d; DX-21-22).

DISCUSSION

The Responsible Employer Issue

The parties agree that Claimant has established a *prima facie* ease of a causal relationship between his asbestos exposure and his peritoneal mesothelioma. The burden shifts to the employer to rebut the Section 20(a) presumption by establishing that a claimant was exposed to asbestos with a subsequent employer. In such occupational disease, the controlling law regarding last responsible employer is set forth in Traveler's Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), cert. denied, 350 U.S. 913 (1955). The last employer rule states that the responsible employer is the employer who last exposed the employee to the injurious stimuli prior to the date upon which the employee was aware or should have been aware of the

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[11] Dr. Reid is Board eligible in Internal Medicine and Hematology/Oncology (DX315-319).

relationship between the disability, disease, and employment.

Norshipco argues that there has been no showing that Claimant was exposed to asbestos at Norshipco. Moreover, Norshipco argues that even if asbestos exposure has been shown at Norshipco, the exposure was minimal and not in sufficient quantities to cause Claimant's disease. Todd Pacific Shipyards Corp. v. Director, OWCP, (9th Cir. 1990) ("Picinich"). I find no merit in either argument. First, I find that the weight of the credible evidence establishes that Claimant was exposed to asbestos while working at Norshipco. Claimant was a very credible witness. He did not pretend to be an expert in identifying asbestos. Claimant took great pains to make clear that he would only state that he had been exposed to asbestos if specifically told so. He truthfully testified that while he believed that he possibly worked on numerous ships at Norshipco from 1978 through 1996 which exposed him to asbestos, he could only recall one incident in 1996 aboard the USS Flint where he was told that asbestos was present. At that lime, he had been working in and around a particular compartment for several days. Indeed, he even stored his tool box in that compartment. One day, Claimant became aware that pipe insulation had ruptured in that compartment. On that day, after the rupture, Claimant was still permitted to enter that compartment twice to pick up and return his tools. The following day, Claimant learned that testing by Norshipco showed that the ruptured insulation had contained asbestos. There is no indication that the compartment was closed

off before or after the rupture. Although Claimant had worn a respirator while in that compartment on that day, there is no evidence that Claimant wore a respirator while working around that compartment after the rupture on that day. Rather, Claimant noted that he had not been wearing his respirator while working around that compartment at the time the rupture occurred. Claimant also noted that he did not normally wear a respirator during an entire eight hour shift. Dr. Steinberg noted that asbestos exposure can occur by not wearing protective clothing while working around asbestos; he also noted that Claimant did not wear protective clothing during the years he was exposed to asbestos. Norshipco offered no evidence to contradict Claimant's assertions concerning his exposure to asbestos aboard the USS Flint in 1996. I find sufficient evidence in the record to conclude that Claimant has established asbestos exposure at Norshipco at least one specific time in 1996.

The credible testimony of Mr. Harrington as supported by Section 635-10.8 of the Naval Ship's Technical Manual (May 13,1986) helps to generally buttress Claimant's testimony that he may well have been exposed to asbestos at other times while performing repair work at Norshipco on various Navy ships from 1978 to 1996. Claimant has shown that at least two Navy ships he worked on were built before 1971. Ships built prior to that date used asbestos for nearly all thermal insulation. Asbestos was also widely used in other shipboard materials such as gaskets, cloth, floor tiles and cement, friction materials, bulkhead tape

and pipe hanger wrap. While Claimant described ship repair work as generally dusty, the evidence is insufficient for me to draw the inference that Claimant was exposed to asbestos on either of these ships. Even though asbestos may well have been present on these ships, there is evidence in the record that by the mid 1970's the industry was well aware of the hazards of asbestos. Claimant did not begin to work for Norshipco until 1978. Even Claimant agreed that Norshipco would generally try to close off areas where asbestos was being removed. Without more, I will not infer that Claimant was exposed to asbestos at Norshipco at any time other than the incident aboard the USS Flint in 1996.

Norshipco's reliance on Picinich, supra, is misplaced. Only the Ninth Circuit holds that minimum exposure to asbestos is not sufficient and that a claimant's employment must have exposed him to injurious stimuli in sufficient quantities to cause the disease. Under the Cardillo, rule, NNS must only show that Norshipco was the last place where Claimant worked where he was exposed to asbestos. NNS has proven subsequent exposure at Norshipco. I conclude that since NNS has proven that Claimant had subsequent asbestos exposure at Norshipco under the Cardillo rule, Norshipco is the responsible employer and is liable for Claimant's permanent total disability benefits, medical costs and all other associated costs.

Section 8(f)

Section 908(f) of the Act limits an employer's liability for compensation payments for permanent total disabilities when the claimant had a pre-existing permanent partial disability, and the disability which exists after the work-related injury is "found not to be due solely" to that injury. See Lawson v. Suwanee Fruit & S.S. Co. 336 US. 198, 200 (1949), This section was designed to remove an employer's financial incentive to discriminate between able-bodied and partially disabled workers in its hiring practices. See Director, OWCP v. Newport News Shipbuilding, 737 F.2d 1295, 1297-1298 (4th Cir. 1984). In such cases where the employer is entitled to Section 8(f) relief, the employer's liability is transferred to the Special Fund administered by the U.S. Department of Labor. I find the evidence insufficient to establish either that Claimant had a pre-existing permanent partial disability or that Claimant's second injury alone was not sufficiently debilitating to have caused permanent total disability.

For the employer to qualify for relief under the Special Fund, the employee must have had an existing permanent partial disability at the time of the injury in question. The term disability in Section 8(f) is not limited to an economic disability under Section 8(c)(21) or one of the scheduled losses specified in Section 8(e)(1)-(20). Disability for purposes of Section 8(f) also encompasses those cases in which an employee has a serious physical disability that would motivate a cautious employer to

dismiss the employee because of' a greatly increased risk of employment-related accident and compensation liability. C&P Telephone Co. v. Director, OWCP, 564 P.24 503, 533 (D.C. Cir. 1977); Coronetz v. Pacific Fisherman, Inc., 11 B.R.B.S. 175, 177-78 (1979). The mere fact of a past injury does not establish disability; there must exist as a result, some serious and lasting physical problem. Director, OWCP v. Belcher Erectors, 17 B.R.B.S., 146, 149(CRT) (1985). This physical problem must in some way affect the employee's ability to function. General Dynamics Corp. v. Sacchetti, 681 F.2d 37 (1st Cir. 1982). Employer maintains that Claimant's September 30, 1996 chest x-ray, read by Dr. Carr, demonstrated a manifest pre-existing disability in the form of lung scarring. Dr. Reid, a NNS clinic physician, opined that this x-ray demonstrated a permanent and serious condition, the knowledge of which would cause a prospective employer not to hire Claimant. Unfortunately, Dr. Reid failed to reconcile Dr. Carr's opinion that the noted scarring did not constitute an acute pulmonary abnormality. While Dr. Reid is Board eligible in Internal medicine, there is no evidence that he is Board eligible in the sub-specialty of Pulmonary medicine, On the other hand, Dr. Schwartz is a Board Certified Internist with a sub-specialty in Pulmonary Medicine. Dr. Schwarz reviewed the medical evidence and agreed that Claimant had atelectasis or scarring of the lungs. However, he opined that it did not contribute in any way to Claimant's level of impairment. He believed that Claimant's total disability was caused solely by Claimant's abdominal mesothelioma.

According to Dr. Schwartz, any breathing difficulty or impairment was due solely to expansion of Claimant's abdominal contents against Claimant's lungs. I find his opinion well reasoned and based on the objective medical evidence. I give his opinion, as that of an expert in the field of pulmonary evidence, compelling weight. Thus, Norshipco has failed to show that Claimant had a pre-existing permanent partial disability.

Norshipco has also failed to prove that Claimant's subsequent injury alone would not have caused Claimant's total permanent disability. See Director, OWCP v. Luccitelli, 964 F2d. 1303, 1306, 26 B.R.B.S. 1 (CRT) (2d Cir. 1992). The United States Court of Appeals for the Fourth Circuit agreed that the "but for" test outlined by the Second Circuit in Luccitelli is also applied in the Fourth Circuit. See Director, OWCP v. Norfolk Shipbuilding and Drydock Corporation, 131 F.3d 1079 (4th Cir. Nov. 17, 1997); see also Maryland Shipbuilding v. Director, OWCP, 618 F2d. 1082 (4th Cir 1980). Since 1980, the Fourth Circuit has held that Section 8(f) is intended to protect employers from paying total disability compensation for an injury that would have been a partial disability "but for" pre-existing conditions. Again, Norshipco relies solely on the opinion of Or. Reid which states that "Mr. Faulk's lung impairment, AMA rating and disability are materially and substantially contributed to, materially and substantially hastened by, and materially and substantially caused by his pre-existing lung scarring disease. If Mr. Faulk merely had mesothelioma, his AMA rating would be

at least 5% less." I give this opinion little, if any, weight. First, Dr. Reid is not a pulmonary specialist. He appears to be characterizing Claimant's mesothelioma as being in Claimant's lungs rather than in Claimant's abdomen. Virtually every other physician has found abdominal mesothelioma with no pleural involvement, Dr. Reid then opines that 5% of Claimant's pulmonary impairment is due to lung scarring disease rather than mesothelioma which causes the remainder of Claimant's totally disabling pulmonary impairment. Dr. Schwartz, a pulmonary specialist, agrees with the other physicians that Claimant's mesothelioma is not pleural. Moreover, Dr. Schwartz can find no pulmonary impairment related to Claimant's lung scarring. Any pulmonary impairment would be from pressure upon the lungs from expansion of abdominal contents caused by the mesothelioma. Dr. Wilson, Claimant's treating physician found Claimant totally disabled due solely to his mesothelioma. Thus I find that Norshipco has failed to show that Claimant's mesothelioma alone would not have caused total permanent disability under the "but for" standard. Accordingly, Norshipco is not entitled to Section 8(1) relief.

ORDER

It is hereby ORDERED that;

1. Norfolk Shipbuilding and Drydock Corporation shall pay to Claimant, Theodore Faulk, permanent total disability

benefits in the amount of $426.72 per week from November 29, 1996, to the present and continuing.

2. Pursuant to Section 7 of the Act, Norfolk Shipbuilding and Drydock Corporation shall compensate Claimant for all medical bills in the treatment of his disability.

3. Interest at the treasury-bill rate specified in 28 U.S.C § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 B.R.B.S. 267 (1984).

4. Norfolk Shipbuilding and Drydock Corporation is entitled to credit for the net amount of all settlement proceeds received by and/or on behalf of Claimant for the Manville Settlement Trust in the amount of $20,000.00 and for the Center for Claims Resolutions for $20,000.00, and for all settlements obtained to date.

5. All computations are subject to verification by the District Director.

6. Counsel for Claimant shall, within thirty days of the date of this decision and order, submit a fully-supported petition for approval of a representative's fee. See 33 U.S.C. 928; 20

C.F.R 702.132. A copy of such petition shall be served on all parties, including Claimant. The parties shall respond with objections thereto, if any. within ten days from the date on which the petition is filed.

DANIEL A. SARNO, JR.
Administrative Law Judge

DAS
Newport News, Virginia

U.S. Department of Labor
Office of Administrative Law Judges
603 Pilot House Drive, Suite 300
Newport News, Virginia 23606-1904
(757) 873-3099
(757) 873-3634

DATE: April 28, 1998

MEMORANDUM FOR:
B.E. Voultsides
District Director
U.S. Department of Labor
Room 212, Federal Building
200 Granby Mall
Norfolk, Virginia 23510

FROM:
Daniel A. Sarno, Jr.
Administrative Law Judge

SUBJECT:

Case Name:	Theodore Faulk v. Newport News Shipbuilding and Dry Dock Company, Norfolk Shipbuilding and Drydock Corporation and Director, OWCP
Case Nos:	97-LHC-1216 & 97-LHC-1496
OWCP Nos:	5-100463 & 5-100464

Pursuant to Section 702.349 of the rules and Regulations governing the Longshore and Harbor Workers' Compensation Act, I am transmitting herewith my signed DECISION AND ORDER in the above-referenced case.

It is my understanding that service of the Decision upon the parties is to be undertaken by your office.

DAS/jbm (Enclosure)

cc: Theodore Faulk (w/o enclosure)
Gary R. West, Esq. (w/o enclosure)
Benjamin M. Mason, Esq. (w/o enclosure)
Gerard E. W. Voyer, Esq. (w/o enclosure)
LuAnn Kressley, Esq. (w/o enclosure)
Joseph Olimpio (w/o enclosure)

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation

May 1, 1998 File No.: 5-100463 and 5-100464
RE: Theodore Faulk v. Newport News Shipbuilding and Dry Dock Company and Norfolk Shipbuilding & Drydock Corp. and Director, OWCP

Mr. Theodore Faulk
Newport News Shipbuilding and Dry Dock Company
Richard-Flagship Services, Inc.
Mr. Gary West, Attorney at Law
Mr. Benjamin M. Mason, Attorney at. Law
Mr. Gerard E. W. Voyer, Attorney at Law

The enclosed DECISION AND ORDER of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order have

been dated and filed in the District Director's office. Procedures for appealing are described on the attached.

The employer/insurance carrier is hereby advised that if the Order awards compensation benefits, the filing of an appeal does not relieve that part of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional twenty percent (20%) is added to the amount of compensation due if not paid within ten (10) days, notwithstanding the tiling of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, Suite 757, 1111 - 20th Street, N.W., Washington, D.C., 20036.

Sincerely,

B.E. Voultsides
District Director
Enclosures

BEV/prh

CERTIFICATE OF FILING AND SERVICE

I certify that on May 1, 1998, the foregoing COMPENSATION ORDER was filed in the office of the District Director, Fifth Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows;

Mr. Theodore Faulk
Post Office Box 5102
Portsmouth, Virginia 23703
Claimant

Newport News Shipbuilding and Dry Pock Company
4101 Washington Ave.
Newport News, Virginia 23607
Self-insured Employer/Insurance Carrier

Richard-Flagship Services, Inc.
Post Office Fox 1560
Norfolk, Virginia 23502
Carrier for Norfolk Shipbuilding

Mr. Gary R. West, Attorney at Law
12350 Jefferson Avenue, Suite 360
Newport News, Virginia 23602
Representative for Claimant

Mr. Benjamin N. Mason, Attorney at law
11742 Jefferson Ave., Suite 260
Newport News, Virginia 23606
Representative for Employer/insurance Carrier/NNSBDDCO

Mr. Gerard E. W. Voyer, Attorney at Law
Post Office 3490
Norfolk, Virginia 23530
Representative for Employer/Carrier/Norshipco

A copy was also mailed by regular mail to the following;

Judge DANIEL A. SARNO, JR.
Office of Administrative Law Judges
U.S. Department of Labor
Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits
U.S. Department of Labor
Suite S-4325
NDLB
Washington, D.C., 20230

B.E. Voultsides, District Director
Fifth Compensation District

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, AS EXTENDED

A petition for reconsideration of a decision and order must be filed with the Office of Administrative Law Judges, U.S. Department of Labor, Washington, P.C., 20210, within ten (10) clays from the date the District Director tiles the decision and order in his/her office.

Any notice of appeal shall be sent by mail or otherwise presented to the Clerk of the Benefits Review Board in Washington, D.C., within thirty (30) days from the date upon which a decision and order has been filed in the Office of the District Director, or within thirty (30) days from the date final action is taken on a timely petition for reconsideration. If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal or protective appeal by filing a notice of appeal within fourteen (14) days of the date on which the first notice of appeal was filed or within the thirty (30) day period described above, whichever period expires last. A copy shall be served upon the District Director and on all parties by the party who files a notice of appeal. Proof of service shall be included with the notice of appeal.

The date compensation is due is the date the District Director files the decision and order in his/her office.

U.S. Department of Labor
Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 98-1128

THEODORE FAULK
Claimant-Respondent

v.

NORFOLK SHIPBUILDING AND
DRYDOCK CORPORATION
Self-Insured
Employer-Petitioner

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY
Self-Insured
Employer-Respondent

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT
OF LABOR
Respondent

DECISION and ORDER

DATE ISSUED: May 17, 1999

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins, L.C.), Newport News, Virginia, for claimant.

Gerard E.W. Voyer and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia. for Norfolk Shipbuilding and Drydock Corporation.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for Newport News Shipbuilding and Dry Dock Company.

LuAnn B. Kressley (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Norfolk Shipbuilding and Drydock Corporation (Norfolk) appeals the Decision and Order (97-LHC-1216, 97-LHC-1496) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffee v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for Newport News Shipbuilding and Dry Dock Company (Newport News) from 1973 until 1978, and he was exposed to asbestos Owing this employment. Claimant then worked for Norfolk from 1978 until 1996 as a shipfitter. On November 27, 1996, Dr. Wilson diagnosed claimant with peritoneal mesothelioma, and the parties stipulated that the condition was caused, at least in part, by asbestos exposure. The parties further stipulated that claimant is permanently totally disabled due to the mesothelioma. Claimant filed claims for compensation against both employers. By order dated April 30, 1997, the administrative law judge, agreeing that the cases against both employers involved the same operative facts and issues, entered an Order of Consolidation and Expedited Hearing.

In his Decision and Order, the administrative law judge found that because claimant's last period of injurious exposure to asbestos occurred during the course of his employment with Norfolk in 1996, Norfolk is the responsible employer under the Act, The administrative law judge awarded claimant permanent total disability benefits of $426.72 per week from November *29,* 1996, to the present and continuing, and medical benefits under Section 7 of the Act, 33 U.S.C. §907. The administrative law judge also awarded claimant interest. The administrative *law* judge further found that Norfolk is entitled to a credit for alt third-party settlements entered into by claimant to date. Finally, the administrative law judge found that Norfolk failed to establish that claimant had a pre-existing permanent partial disability that contributed to claimant's total disability as required by Section 8(1) of the *Act,* 33 U.S.C. §908(0; therefore he denied Norfolk relief from the Special Fund.

On appeal, Norfolk challenges the administrative law judge's finding that it is the responsible employer and that it is not entitled to Section 8(1) relief. Newport News responds, urging affirmance of the administrative law judge's finding that Norfolk is the responsible employer based on application of the last employer rule. The Director, Office of Workers' Compensation Programs (Director), has responded, confining its brief to the Section 8(f) issue. Claimant also has filed a response brief, urging that the administrative law judge's responsible employer finding be affirmed.

After consideration of the evidence, we affirm the administrative law judge's responsible employer determination, because his finding that claimant was last exposed to injurious stimuli while employed with Norfolk and that it is thus the responsible employer wider the Act is supported by substantial evidence and in accordance with law. *See O'Keefe,* 380 U.S. at 339. The standard for determining the responsible employer or carrier was enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied,* 350 U.S. 913 (1955). Pursuant to *Cardillo,* the last employer or carrier to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for any compensation owed under the Act. *Accord Todd Shipyards Corp. v. Black,* 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *see also Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir 1988). A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard. *See Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Depart. Of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989).

In the present case, the administrative law judge concluded that claimant was last exposed to injurious stimuli while working for Norfolk. In so finding, the administrative law judge found claimant to be a very credible witness, noting that

claimant was candid about his lack of expertise in identifying asbestos and only alleged exposure to asbestos when he was certain of it. Claimant testified that, while he believed he may have worked on many ships exposing him to asbestos at Norfolk,[12] he could recall only one incident of confirmed exposure to asbestos, which occurred aboard the USS FLINT, when pipe insulation ruptured in a particular compartment where he worked; claimant testified he entered this area twice following the rupture to pick up and return tools. Tr. At 64; NNS Ex. 1 at 35-40. Claimant stated that he wore a respirator on the day he learned of the presence of asbestos, but had not been wearing a respirator at the time the rupture occurred. Tr, at 68. The administrative law judge further reasoned that the credible testimony of Mr. Barrington, an industrial hygienist at Newport News) generally buttresses claimant's testimony that he may have been exposed to asbestos at other times while performing repair work at Norfolk on various Navy ships. According to Mr. 1larrington, based on the Naval Ship's Technical Manual, §633-10.8 (1st rev. May 15, 1986), ships built prior to 1971 used asbestos for thermal insulation. Tr, at 93,96-97; NNS Ex. 4..Mr. Harrington confirmed that two of the

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[12] Claimant recalled working on other U.S. Navy ships which may have exposed him to asbestos. Claimant's work involved chipping and tearing out tile flooring, which he later learned could have contained asbestos. He also worked around other employees tearing out insulation and later learned it may have contained asbestos.

ships on which claimant worked at Norfolk were built before 1971.

The evaluation of this evidence was within the administrative law judge's authority. As the fact finder, the administrative law judge was entitled to conclude that claimant was a credible witness. *See Jones Stevedoring Co. v. Director, OWCP ITaylor)* ', 133 K3d 683, 31 BRBS 178 (CRT) (9th Cit. 1997). *See also Avondale Industries, Inc. v. Director, OWCP,* 977 F.2d 186, 26 BRBS 115 (CRT) (9th Cir. 1992). As the administrative law judge rationally credited claimant's testimony and found it supported by other credible evidence, his conclusion that claimant was exposed to asbestos during his employment at Norfolk is supportcd by substantial evidence.

We reject Norfolk's assertion *that Port Portland v. Director, OWCP,* 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), and *Todd Pacific Shipyard v. Corp. v. Director, OWCP [Picinich),* 914 F.2d 1317, 24 BRBS 36 (CRT) (9th Cir. 1990), require a showing that claimant's exposure to asbestos actually contributed to or aggravated his occupational disease. The court in *Port of Portland* specifically rejected this contention, stating, "[w]e agree with the Board that *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 I3RBS 744 (9th Cri. 1978), *cert. denied,* 440 U.S. 911(1979), does not require a demonstrated medical causal relationship between claimant's exposure and his occupational disease." *Port of Portland* 932 E.2d at 840,24

BRBS at 143 (CRT). The United States Court of Appeals for the Fifth Circuit has held as well that regardless of the brevity of the exposure, if it has the potential to cause disease, it is considered injurious. *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012, 12 BRBS 973, 978(5th Cir.), *cert, denied,* 454 U.S. 1080 (1981), *cited in Avondale Industries,* 977 F.2d at 190, 26 BRBS at 113 (CRT); *see also Lustig,* 881 P.24 at 593, 22 BRBS at 139 (CRT).

In *Susoeff v. The San Francisco Stevedoring Co.,* 19 BRBS 149 (1986), the Board addressed employer's burden of proof regarding causation and the determination of the responsible employer. The Board held that once an employee has established that he was exposed to injurious stimuli while engaged in covered employment, that employer could escape liability by showing that the employee's injury is not work-related or by establishing that he was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Id.* at 151. *Accord Avondale Industries,* 977 F.2d at 186, 26 BRBS at 113 (CRT); *General Ship Service v. Director, OWCP,* 938 F.2d 960, 25 BRJ3S 22 (CRT) (9th Cir. 1991). *See also Lins* v. *Ingalls Shipbuilding, Inc.,* 26 BRBS 62 (1992). Norfolk has not provided any evidence that claimant's injury is not work..related or that claimant was engaged in subsequent covered employment. Moreover, *Picinich* does not aid Norfolk, as in that case the employer produced evidence that exposure was below levels considered injurious. Norfolk has not

produced such evidence her; and it bears the burden of proving it as not the responsible employer. Accordingly, we affirm the administrative law judge's finding that Norfolk is the responsible employer.

Norfolk next challenges the administrative law judge's denial of Section 8(f) relief. The administrative law judge denied Norfolk's request for relief pursuant to Section S(f), finding that it failed to establish the contribution and pre-existing permanent partial disability elements necessary for such relief to be granted. The Director has responded, seeking affirmance of the administrative law judge's denial of Section 8(1) relief.

Section 8(t) shifts liability topsy compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. § §908(0, 944. An employer may be panted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest preexisting permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. *See* 33 U.S.C. §908(f)Q); *Director, OWCP* v. *Luccitelli,* 964 F2d. 1303, 26 BRBS I (CRT) (2d Cir.1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *John T. Clark & Son of Maryland v. BRB.*, 622 F.2d 93, 12 BRBS 229(4th Cir. 1980). Thus, where an employee is permanently totally disabled, an employer must demonstrate that

the total disability is caused by both the work injury and the pre-existing condition in order to receive Section 8(f) relief. *See Director, OWCP v. Jaffee New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994); *Dominey* v. *Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

In order to establish a pre-existing permanent partial disability "[there must exist, as a result of [an] injury, some serious, lasting physical problem." *Director, OWCP v. Belcher Erectors* 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT)(D.C. Cir. 1985); *C & p Telephone co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). The only evidence of record to support employer's allegation *is* a September30, 1996 chest x-ray, read by Dr. Can, showing "[s]ome linear atelectasis or scarring." NSC Ex. 8(c). Although the administrative law judge gave the opinion of Dr. Schwartz that x-ray evidence of lung scarring did not contribute in any way to claimant's level of impairment compelling weight, this opinion is relevant to the contribution element of Section 8(0. rather than to the existence of a pre-existing disability. The administrative law judge, however, also found that Dr. Reid, the Newport News clinic physician, whose opinion Norfolk maintains establishes a pre-existing serious condition, failed to reconcile Dr. Can's opinion that the noted scarring represented "no acute cardiopulmonary abnormality," NSC Ex. 8(c), with his statement that the x-ray demonstrated a permanent and serious pre-existing condition. NSC Ex. 8(d). The administrative law judge also noted that

there was no evidence that Dr. Reid was Board-eligible in pulmonary medicine. The administrative law judge thus essentially discredited Dr. Reid's opinion based on his lack of expertise and because the administrative law judge did not find it well-reasoned, Accordingly, we affirm the administrative law judge's finding that Norfolk failed to establish that claimant had a pre-existing permanent partial disability.

Norfolk next argues that the administrative law judge erred in applying the *Luccitelli* rule to find that mesothelioma alone caused claimant's permanent total disability, as mesothelioma is a fatal disease which always results in disability and death, thus undermining the Congressional intent of Section 8(1). We reject Norfolk's assertion, as the statute requires that the ultimate disability not be solely due to the last injury, and we affirm the administrative law judge's determination that Norfolk has failed to show that claimant's mesothelioma alone would not have caused permanent total disability. "Where a subsequent injury and its effects are alone sufficient to cause permanent total disability the mere presence of' a pre-existing disability will not warrant contribution from the special fund," *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 143, 32 BRBS 48, 55 (CRT) (4th Cir, 1998), *citing John T Clark & Son of Maryland, Inc.* v. *BRB,* 621 F.2d 93, 95 & n.2 (4th Cir. 1980). Contrary to Norfolk's contention, it was within the administrative law judge's discretion to give the opinion of Dr. Reid that claimant's

lung scarring materially and substantially contributed to his condition little, if any, weight both because Dr. Reid is not pulmonary specialist and as he appears to characterize claimant's mesothelioma us being in his lungs rather than his abdomen, whereas virtually all other physicians found abdominal mesothelioma with no pleural involvement.[13] Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record, we affirm that finding and consequently his denial of Section 8(f) relief in this case.[14] *See*

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[13] Dr Reid's opinion is, in any case, relevant to the standard for establishing entitlement to Section 8(F) relief in the case of permanent partial, rather than permanent total, disability. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines],* 138 F.3d 134,32 BRBS 48 (CRT) (4th Cir. 1998). Moreover, as Director notes, contrary to Norfolk's assertion, in *Director, OWCF v. Newport News Shipbuilding & Dry Dock Co. [Harcum 11],* 131 F.3d 1079,31 BRBS 164 (CRT)(4th Cir. 1997), the Fourth Circuit did not preclude the application of the "but for" test; rather it concluded that it was not applicable in cases of permanent partial disability.

[14] Norfolk's contention that the administrative law judge erred in applying the "but for" test in this ease is not dispositive. Norfolk is referring to the test devised by some circuits which requires that an employer prove entitlement to Section 8(f) relief by showing that "but for" the pre&existing disability, the claimant would be employable. *See Director, OWC.P v. Jaffe*

generally Cordero, 580 F.2d at 1331, 8 BRBS at 744.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

New York Decorating, 25 F.3d 1080, 28 BRBS 30 (CRT)(D.C. Cir. 1994); *CNA Ins. Co. v. Legrow,* 935 F.2d 430, 202 (CRT) (1st CiR. 1991). As employer states, the Courts of Appeals have phrased employers burden of proof using either "not due solely" terminology or "but for" terminology. In *Dominey,* the Board held that the "but for" test is merely a variation of the standard used by Courts of Appeals having the same implications; a claimant's total disability must have been caused by both the work injury and pre-existing condition. 30 BRBS at 137. In this case, the administrative law judge, after weighing the medical evidence of record, reasonably relied on the medical opinions that claimant was permanently totally disabled due to his asbestos-related mesothelioma alone. His finding that claimant's mesothelioma is alone permanently totally disabling is supported by substantial evidence, and therefore under either test, employer has not proven entitlement to Section 8(f) relief.

Administrative Appeals Judge

_____

JAMES F. BROWN
Administrative Appeals Judge

CERTIFICATE OF SERVICE

98-1128 Theodore R. Faulk v. Newport News Shipbuilding and Drydock Company, Norfolk Shipbuilding and Drydock Corporation (Case No. 97-LHCA-1216) (OWCP No. 05-0100463), 05-0100464)

I certify that the parties below were served this day.

_____

DATE

_____

Thomas O. Shepherd, Jr.
Clerk of the Board

Gary R. West, Esq.
Patten, Wornom and Watkins
12350 Jefferson Avenue

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–Certified

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Supreme Court, U.S.
FILED
DEC 19 2000
OFFICE OF THE CLERK

No. 00-576

In the Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORP.,
PETITIONER

v.

THEODORE FAULK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
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Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the court of appeals correctly found petitioner liable for an occupational disease claim under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, due to petitioner's failure to rebut the presumption in 33 U.S.C. 920(a) "[t]hat the claim comes within the provisions of [the LHWCA]."

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In the Supreme Court of the United States

No. 00-576

NORFOLK SHIPBUILDING & DRYDOCK CORP.,
PETITIONER

v.

THEODORE FAULK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 228 F.3d 378.[1] The decision and order of the Benefits Review Board of the United States Department of Labor (Pet. App. 3) and the decision and order of the administrative law judge (Pet. App. 2) are unreported.

[1] The court of appeals' decision was originally unpublished and noted at 217 F.3d 840 (Table), but was later released for publication with minor changes not relevant to this case.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2000. The petition for a writ of certiorari was filed on October 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Theodore Faulk worked as a shipfitter for respondent Newport News Shipbuilding and Dry Dock Company (NNS) from January 1973 to November 1978. Pet. App. 2, at 6; Pet. App. 3, at 3.[2] He then worked as a shipfitter for petitioner from November 1978 until November 1996. Pet. App. 1, at 4; Pet. App. 2, at 7. Both employers exposed him to asbestos. Pet. App. 1, at 4-11; Pet. App. 2, at 6-8. After being diagnosed with peritoneal mesothelioma in November 1996, shortly after being exposed to asbestos while working for petitioner aboard the *U.S.S. Flint*, Faulk filed claims for compensation against both employers under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Pet. App. 3, at 3.

Petitioner and NNS stipulated that Faulk's disease was caused at least in part by exposure to airborne asbestos and that he was permanently and totally disabled. Pet. App. 2, at 4-5. NNS did not dispute that it had exposed Faulk to asbestos. *Id.* at 6 n.3. Petitioner denied that it had done so and argued that even if it had exposed Faulk to asbestos while he worked aboard the *U.S.S. Flint*, the exposure was minimal and insufficient to cause Faulk's disease. *Id.* at 16. NNS

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[2] The appendices to the certiorari petition are not paginated. We accordingly have separately paginated each of the appendices for purposes of citation in this brief.

argued that petitioner was responsible under the "last employer rule," which provides, as relevant to this case, that full liability for an occupational disease falls on the last employer to expose an employee to injurious stimuli before the employee became aware or should have become aware of the relationship between the disability, disease, and employment. See *id.* at 15-16, 18; *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 144-145 (2d Cir.), cert. denied, 350 U.S. 913 (1955).

2. An administrative law judge (ALJ) held that petitioner is liable under the last employer rule. Pet. App. 2. The ALJ noted that the parties had agreed that Faulk was entitled to the presumption in 33 U.S.C. 920(a) "[t]hat the claim comes within the provisions of [the LHWCA]." Pet. App. 2, at 15. The ALJ concluded that NNS was not liable because it had established that Faulk had been subsequently exposed to asbestos upon at least one occasion in 1996 while working for petitioner after leaving the employment of NNS. See *id.* at 15-18. Under the last employer rule, the ALJ found that such subsequent exposure placed liability on petitioner rather than on NNS. See *id.* at 16, 18. The ALJ declined to follow the holding of the Ninth Circuit that "a claimant's employment must have exposed him to injurious stimuli in sufficient quantities to cause the disease," and therefore did not inquire into the extent of Faulk's exposure to asbestos. *Id.* at 18 (citing *Todd Pacific Shipyards Corp.* v. *Director, OWCP*, 914 F.2d 1317 (9th Cir. 1990)) (*Picinich*).[3]

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[3] The ALJ also concluded that petitioner failed to establish the conditions necessary to shift part of its liability to a special fund that the Department of Labor administers. Pet. App. 2, at 19-22; see 33 U.S.C. 908(f), 944. The Benefits Review Board affirmed the ALJ's decision on that point. See Pet. App. 3, at 9-13. Petitioner

3. The Benefits Review Board affirmed. Pet. App. 3. The Board reasoned that substantial evidence supported the ALJ's finding that the claimant was last exposed to injurious stimuli while working for petitioner and that petitioner accordingly is liable. *Id.* at 5; see 33 U.S.C. 921(b)(3) ("findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole"). In this regard, the Board noted that, under the last employer rule, a distinct aggravation of an injury need not occur for the employer to be liable because "exposure to potentially injurious stimuli is all that is required." Pet. App. 3, at 5; see also *id.* at 7-8. The Board concluded that petitioner's reliance on *Picinich* was misplaced because in that case the employer had produced evidence that its exposure was below levels considered injurious, whereas petitioner "has not produced such evidence her[e]." *Id.* at 8-9.

4. The court of appeals affirmed. Pet. App. 1. The court reasoned that to rebut the presumption "[t]hat the claim comes within the provisions of [the LHWCA]," 33 U.S.C. 920(a), an employer must present substantial evidence that its exposure of the claimant to injurious stimuli was not injurious or that the claimant was exposed to injurious stimuli while performing work covered by the LHWCA for a subsequent employer. Pet. App. 1, at 13-14. Exposure is injurious, the court reasoned, when it has "the potential to cause the disease or harm at issue." *Id.* at 14. Accordingly, the court rejected the ALJ's conclusion that NNS had rebutted the presumption against it by establishing that Faulk subsequently was exposed to asbestos while

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did not challenge that aspect of the Board's decision in the court of appeals, and it does not do so here.

working for petitioner, because NNS did not establish *that such subsequent exposure had the potential to* cause Faulk's mesothelioma. See *id.* at 16.

The court of appeals did agree, however, with the ultimate assignment of liability to petitioner, finding that substantial evidence supported the ALJ's conclusion that petitioner was the last responsible employer. Pet. App. 1, at 16. As an initial matter, the court noted that because petitioner was the claimant's last employer, petitioner could not establish that the claimant was exposed to injurious stimuli while working for any subsequent employer. *Id.* at 16-17. The court then determined that the ALJ's conclusion that petitioner exposed Faulk to asbestos was supported by substantial evidence, see *id.* at 17-20, and it rejected petitioner's alternative argument that even if Faulk was exposed, the disease's long latency period, coupled with the brevity of Faulk's exposure, should have led the ALJ to find that petitioner had rebutted the presumption of compensability. See *id.* at 20-24. The court of appeals concluded that "[t]he evidence in this case fails to support the inference that due to the prolonged latency period of mesothelioma it was factually impossible for Faulk to have sustained injury by his exposure" while working for petitioner. *Id.* at 22. Regarding brevity of exposure, the court rejected petitioner's argument that the court should follow the Ninth Circuit's reasoning in *Picinich* and hold that a LHWCA claimant must be exposed "to injurious stimuli in sufficient quantities to cause the disease." *Id.* at 24 (quoting *Picinich*, 914 F.2d at 1319). The court further noted that, even if a de minimis exception to the requirements of the Act did apply, petitioner "presented no evidence to establish that Faulk's exposure aboard the *U.S.S. Flint* was, in fact, de minimis. It

presented no evidence of the asbestos level on the *U.S.S. Flint* the day of the incident, nor did it present evidence of the level of exposure it would take to cause the disease." *Id.* at 22. The court noted that, in contrast, evidence in *Picinich* indicated that the ship on which the claimant worked had undergone a complete asbestos removal procedure prior to his arrival, and testing of the area showed asbestos levels 250 times below the limit allowed by government regulations. *Id.* at 24.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The LHWCA provides compensation for "disability," 33 U.S.C. 908, a term that generally means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury," 33 U.S.C. 902(10). An "injury" in turn includes any "occupational disease or infection as arises naturally out of * * * employment." 33 U.S.C. 902(2). Every circuit that has considered the issue has held that such an injury arises out of employment if the employment either causes the injury or aggravates a preexisting condition. See *Bunge Corp.* v. *Carlisle*, 227 F.3d 934, 939 (7th Cir. 2000); *Morehead Marine Servs., Inc.* v. *Washnock*, 135 F.3d 366, 371 (6th Cir. 1998); *Bath Iron Works Corp.* v. *Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997); *Blanchette* v. *OWCP*, 998 F.2d 109, 112 (2d Cir. 1993); *Port of Portland* v. *Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991); *Strachan Shipping Co.* v. *Nash*, 782 F.2d 513, 517 (5th Cir. 1986) (en banc); *Newport News Shipbuilding & Dry Dock Co.* v. *Fishel*,

694 F.2d 327, 329-330 (4th Cir. 1982); *Hensley* v. *Washington Metro. Area Transit Auth.*, 655 F.2d 264, 268 (D.C. Cir. 1981); *Ridgley* v. *Ceres, Inc.*, 594 F.2d 1175, 1177 (8th Cir. 1979); *Atlantic & Gulf Stevedores, Inc.* v. *Director, OWCP*, 542 F.2d 602, 608 n.4 (3d Cir. 1976). Thus, a claimant such as Faulk is entitled to LHWCA compensation if he is disabled as a result of an occupational disease that is either caused by or aggravated by his LHWCA employment.[4]

Section 20(a) provides that "[i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary[,] * * * [t]hat the claim comes within the provisions of this chapter." 33 U.S.C. 920(a). If the employer produces "substantial evidence to the contrary," the presumption drops from the case and the factfinder must weigh all the evidence in the record as a whole. See, *e.g.*, *American Grain Trimmers, Inc.* v. *OWCP*, 181 F.3d 810, 818 (7th Cir. 1999) (en banc), cert. denied, 120 S. Ct. 1239 (2000); cf. *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935) ("Once the employer has carried his burden [of rebutting the presumption in Section 20(d) of the LHWCA, 33 U.S.C.

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[4] In cases where a claimant develops an occupational disease after exposure to injurious stimuli by more than one employer, courts have adopted the "last employer rule," which generally assigns liability for the disease to the last employer to expose the claimant to injurious stimuli before he became aware of the disease. See Pet. App. 1, at 12 and cases cited therein; H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 28 (1984) (in most recent LHWCA amendments, legislators "d[id] not disturb" the last employer rule and aggravation theory). The court of appeals applied that rule, the validity of which petitioner does not challenge, see Pet. App. 1, at 13, to assign liability to petitioner rather than to NNS, see *id.* at 12, 24.

920(d), that an employee's injury or death was not willfully intentional] by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case."); *U.S. Indus./Fed. Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608, 612 n.5 (1982) ("It seems fair to assume * * * that the § 20(a) presumption is of the same nature as the presumption created by § 20(d).").

Petitioner concedes that "[o]nce the claimant establishes that an exposure had the potential to cause harm, he receives the benefit of the § 20(a) presumption that the exposure did, in fact, cause harm." Pet. 5. But petitioner contends that it met its burden of offering substantial evidence to rebut the presumption, noting that it offered medical testimony that Faulk's exposure to asbestos while working for petitioner did not cause his mesothelioma. Pet. 4-5.

Petitioner's argument lacks merit. Under the LHWCA, petitioner may be held liable for any exposure that either causes *or aggravates* a disease. Petitioner failed to present substantial evidence demonstrating that its exposure of Faulk to asbestos did not, at the very least, aggravate his mesothelioma. Petitioner "presented no evidence of the asbestos level on the *U.S.S. Flint* the day of the incident, nor did it present evidence of the level of exposure it would take to cause the disease." Pet. App. 1, at 22. Petitioner's medical expert, who did not personally examine Faulk, "merely opined that the *U.S.S. Flint* exposure did not *cause* Faulk's mesothelioma." *Id.* at 22-23 (emphasis added); see Pet. App. 2, at 12-13. Accordingly, the court of appeals did not err in holding that petitioner failed to meet its evidentiary burden and that it was therefore liable under the LHWCA.

Petitioner does not address its failure to produce evidence on the aggravation issue, but instead argues

that the court of appeals erred by rejecting evidence that its exposure "did not cause Faulk's disease" and by requiring evidence that the "exposure 'did not have the *potential* to cause the disease or was in insufficient quantities to cause'" the disease. Pet. 4 (quoting Pet. App. 1, at 23). Petitioner's arguments are meritless because, as discussed above, petitioner was required to show not only lack of causation but lack of aggravation. The court of appeals rightly concluded, as an evidentiary matter, that petitioner failed to produce substantial evidence that its exposure did not, *in fact*, contribute to the harm.

2. Contrary to petitioner's argument (Pet. 5), there is no conflict between the court of appeals' decision and this Court's decision in *U.S. Industries*. In that case, a claimant sought disability benefits under the LHWCA based on an alleged neck injury he sustained at work. 455 U.S. at 610. The ALJ denied benefits after concluding that the claimant testified falsely as to how the accident happened, and the Benefits Review Board affirmed. *Ibid.* The court of appeals vacated the denial of benefits on the ground that the claimant had invoked the presumption in 33 U.S.C. 920(a) by establishing an injury when he awoke in pain the day after the alleged accident. 455 U.S. at 611-612. This Court held that the court of appeals erred by (1) invoking the presumption in support of a theory of recovery that was not advanced by the claimant, and (2) incorrectly construing the term "injury," which is defined in 33 U.S.C. 902(2) as an accidental injury arising out of and in the course of employment. 455 U.S. at 612-616. The Court "d[id] not decide the scope of the § 20(a) presumption," *id.* at 609 n.1, nor did it address the employer's burden of rebutting the presumption. Accordingly, there is no conflict between *U.S. Industries* and the court of

appeals' holding that petitioner failed to rebut the presumption.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2000

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[5] Petitioner also argues (Pet. 3) that the court of appeals' decision is inconsistent with decisions of other courts of appeals, but does not identify any such decisions. In this case, the court of appeals "declined to adopt," Pet. App. 1, at 24, the rule set forth by the Ninth Circuit in *Picinich* that a LHWCA claimant must be exposed "to injurious stimuli in sufficient quantities to cause the disease," 914 F.2d at 1319. However, the court noted that even if a de minimis exception existed, it would not apply here because petitioner "presented no evidence to establish that Faulk's exposure aboard the U.S.S. Flint was, in fact, de minimis." Pet. App. 1, at 22; see pp. 7-8, *supra*. Therefore, this case does not present an appropriate vehicle to consider the soundness of the Ninth Circuit's decision in *Picinich* or whether the LHWCA contemplates a de minimis exception.